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In the
Supreme Court of the United States

OCTOBER TERM, 1942

No.....

THE CUSHMAN MOTOR WORKS, PETITIONER

VS.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, The Cushman Motor Works, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, entered in the above-entitled case on October 19, 1942, affirming a deficiency in corporation in-

come and excess-profits tax found by the Board of Tax Appeals against Petitioner in the sums of $11,278.34 and $1,191.87 for the petitioner's fiscal years ended July 31, 1935 and 1936, respectively.

OPINIONS BELOW

The findings and opinion of the United States Board of Tax Appeals (R. 23-42) (now United States Tax Court) is reported in 44 B. T. A. 1288. The opinion of the Circuit Court of Appeals (R. 230-237) was filed October 19, 1942, but is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on Oct. 19, 1942 (R. 238); petition for rehearing timely filed and denied Nov. 6, 1942 (R. 255); order staying mandate 30 days entered November 14, 1942, (R. 255). The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

I.

Whether the general statutory powers granted a dissolved Nebraska corporation to close up its business and settle its affairs include authority to be a corporate party to an income tax-free "reorganization," or, as the Circuit Court of Appeals holds, whether such authority must be specifically granted.

Whether the Circuit Court failed to follow applicable local decisions relative to powers of Nebraska corporations in process of dissolution.

II.

Whether federal income tax laws and regulations extend corporate life of dissolved corporations during and for purposes of liquidation and winding-up.

III.

Whether the rule of strict construction applied to the powers of dissolved corporations is federal precedent that state statutes of early origin, intended to operate prospectively in broad and remedial derogation of the common law, must be restricted to their exact terms, and held incapable of encompassing subsequently arising conditions within their purview.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Revenue Act of 1934, c. 277, 48 Stat. 680, are set forth in the Appendix, infra.

Briefly stated, the applicable revenue act provides that the basis of property for determining gain or loss shall be its cost, except that if acquired by a corporation in connection with a "reorganization," then the basis shall be the same as it would be in the hands of the transferor (Sec. 113 (a) (7)). "Reorganization" includes a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred (Sec. 112 (g) (1) (C)).

Petitioner's transferor, Cushman Motor Works, was dissolved by its stockholders prior to transfer of assets to petitioner. It was held that it did not have sufficient corporate life after dissolution to be a corporate party to a reorganization.

The applicable Nebraska laws on dissolution of corporations are set forth in the Appendix hereto.

The applicable Treasury Regulation is quoted under II, infra.

STATEMENT

Both the Board (R. 24) and the Circuit Court of Appeals found that petitioner in 1934 "acquired certain personal property assets formerly owned by Cushman Motor Works (herein called Motor Works) a dissolved Nebraska corporation", (R. 231). That they were acquired in exchange for stock of petitioner is conceded. The Board stated (R. 39) that "Motor Works was a Nebraska corporation and we find nothing in the Nebraska statutes extending the life of a corporation beyond the date of its dissolution." Because of this conclusion, (which was abandoned by respondent), the Board's theory was that it was unnecessary to consider (R. 41) whether there was an intercorporate reorganization under Section 112, Revenue Act of 1934. Section 112 (b) (4), (g) (1) (C) and (2), defining "reorganization" and "a party to a reorganization," contemplate and require intercorporate transactions. Concededly, if Motor Works was dead for all purposes, it could not transfer or exchange its assets for stock of petitioner, nor in any way be a party to a reorganization.

In its opinion the court notes (R. 232), "the Commissioner ignores the theory upon which the Board decided the case," and that the Commissioner sought affirmance on other grounds, commenting that if either was correct, an affirmance should follow. The new theory was that proof of required control in transferor or its stockholders after the transfer was lacking. The court did not sustain the

Commissioner's new theory. Its entire decision is based, as was that of the Board, on the theory of corporate incapacity of a dissolved corporation. It held that "no statutory exceptions in Nebraska giving to a dissolved corporation authority to be a 'party' to a 'reorganization' • • • have been called to our attention and we find none" (R. 234).

Regardless of whether the theory is that no prolongation statutes existed, or that they were too narrow to embrace the act done, the result is the same, viz., no intercorporate transaction requisite to reorganization could take place.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

I.

1. In holding that a specific statutory authorization must exist before a dissolved Nebraska corporation could be a "party" to "reorganization" under the income tax law.

2. In failing to hold that the general powers granted a dissolved Nebraska corporation to close up its business and settle its affairs include authority to be a party to such reorganization.

3. In failing to follow applicable Nebraska decisions relative to powers of Nebraska corporations in process of dissolution.

II.

4. In failing to consider and apply Art. 22 (a) 20, U. S. Treasury Regulations 86, promulgated under the Revenue Act of 1934, and pertinent federal decisions relative to income-tax treatment of dissolved corporations.

III.

5. Because it established a federal precedent that state statutes of early inception, intended to operate protectively in broad and remedial derogation of the common law, can embrace only new conditions anticipated by specific enactment.

REASONS FOR GRANTING THE WRIT

I.

In holding there are no Nebraska statutory exceptions giving dissolved corporations authority to be a "party" to income tax-free reorganizations, (R. 234), the decision of the Circuit Court is in conflict with an applicable decision of the Supreme Court of Nebraska in *Schmitt & Bros. Co.* v. *Mahoney,* 60 Neb. 20, 21, 24, 25, 82 N. W. 99. The Circuit Court mistakes the effect of that opinion. The Circuit Court construes it to merely hold that a suit brought by a dissolved corporation cannot be abated under the Nebraska Code of Civil Procedure.[1] Contrary-wise, the holding is that the case could have been abated under the Code,[2] but was maintainable by reason of Sects. 63 and 67, of Chapter 16,[3] entitled "Corporations." "That legislation," the state court said, "confers ample authority upon every dissolved corporation to prosecute suits in its corporate name as though the corporation had never been dissolved." Next, state court said: "The purpose and objects of the sections were to save every corporate right and power to defunct corporations * * *."

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[1] (R. 233.)

[2] pp 23, 24, *Schmitt & Bro. Co.* v. *Mahoney,* supra.

[3] Comp. Stat., Nebr., 1897. These sections were 24-108, 112, Comp. Stat., Nebr., 1929, during the applicable period.

The phrase "purpose and objects of the sections" obviously refer to *all* the dissolution sections of Chapter 16 and not restrictively to Sects. 63 and 67,[4] because the next following sentence refers specifically to Sects. 63 and 67 as "being special provisions in regard to a particular subject" and "control all general powers." One of the dissolution sections obviously referred to[5] authorizes dissolved corporations to "continue to act for the purpose of closing their business." Another,[6] gives last directors as trustees "full power to settle the affairs," and, "divide among stockholders the money and property that shall remain." Still another section[7] authorizes the trustees to sell and dispose of real estate "in such manner and upon such terms as may be thought best for the interest of the creditor and stockholders * * *."

The purposes and objects of the foregoing were to "save every corporate right and power to defunct corporations," according to opinion of the state court. One corporate right is to be a party to an income tax reorganization. The lower court holds that right does not exist. The opinions conflict.

The decision is likewise in conflict with the applicable local decision in *Heenan & Finlan* v. *Parmele, et al,* 80 Nebr. 514, 520, 118 N. W. 324. There a last acting director of a dissolved Nebraska corporation was held to be "the

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[4] p 25, *Schmitt & Bro. Co.* v. *Mahoney*, supra.

[5] Sect. 143, Comp. Stat. Nebr., 1897. This was 24-220, Comp. Stat. Nebr., 1929, during the applicable period.

[6] Sect. 62, Comp. Stat. Nebr., 1897. This was 24-107, Comp. Stat. Nebr., 1929, during the applicable period.

[7] Sect. 65, Comp. Stat. Nebr., 1897. This was 24-110, Comp. Stat. Nebr., 1929 during the applicable period.

sole trustee and the only person legally authorized to bind the corporation" to a contract of sale. In the case at bar, the last director-trustees contracted to exchange the entire assets, both real and personal, for stock. Not having held the dissolved corporation dead for all purposes, the Circuit Court must have contemplated the trustees had some powers for winding-up. They could only be (a) to distribute the assets in kind; (b) to sell them for cash and divide the cash; (c) to exchange them for other property in liquid form for distribution. Had the trustees done either (a) or (b), the court would have held the act within their power and function. The effect of the court's decision is that they could sell or exchange assets for cash, but could not sell or exchange assets for other assets, liquid in form and approved by stockholders for distribution to them pro-rata.[8] Here the trustees were also the only persons "legally authorized to bind the corporation." By Sec. 24-107 they were the statutory trustees of the stockholders, with "full power to settle the affairs" and divide "money and property." To hold in effect that they could sell and convey for cash, but could not carry out a stockholder-sanctioned exchange is a restrictive interpretation not justified by Nebraska or any

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[8] Power of corporation to sell assets for stock has been recognized even in cases where the minority stockholders objected, if the stock was readily marketable. *Geddes* v. *Anaconda Min. Co.,* 254 U. S. 590, 65 L. Ed. 425.

[9] 13 Am. Jur. Sec. 796, p. 815—"It is also generally held that a corporation for the purpose of winding up its affairs has power with the consent of a majority of its stockholders to sell its stock in good faith to another corporation and take in payment the stock of the purchasing corporation, with a view to distributing such stock among its stockholders."

controlling precedent.[9] Restrictive interpretation is justified only in case of punitive forfeiture statutes.[10]

In construing state corporation laws, an elemental is that state sovereignty is absolute over corporate life of its creation.[11] The local statutes and decisions thus present an appropriate situation for the application of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 78, 58 S. Ct. 817, 82 L. ed. 1188. It states " * * * the law to be applied in any case is the law of the state. And whether * * * declared * * * in a statute or by its highest court * * * is not a matter of federal concern." *Hawks* v. *Hammil*, 288 U. S. 52, 58, 59, 53 S. Ct. 240, 77 L. ed. 610, also announces this guiding rule: "If the single decision * * * is clear * * * submission to its holding has developed * * * into a practice * * *. Indeed the radiating potencies of a decision may go beyond the actual holding. * * * An opinion may be so framed that there is doubt whether the part of it invoked as an authority is to be ranked as a definitive holding or merely a considered dictum. * * * At least it is a considered dictum, and not comment merely obiter. It has capacity, though it be less

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[10] See *C. B. Havens & Co.* v. *Colonial Apt House Co.*, 97 Nebr. 639, 150 N. W. 1011; *Weekes Grain & Live Stock Co.* v. *Ware & Leland*, 99 Nebr. 126, 127, 155 N. W. 223, where, under a forfeiture statute the court said: "This is a harsh, technical rule resulting from a forfeiture made imperative by legislation as judicially construed. The statute makes a distinction between a corporation forfeiting its charter for nonpayment of a fee and other corporations abandoning or losing charter for other reasons."

[11] *Chicago T. & T. Co.* v. *4136 Wilcox Bldg. Corp.*, 302 U. S. 120, 127, 128.

than a decision, to tilt the balanced mind toward submission and agreement."

The Circuit Court refused to apply the above rule in the case at bar, but recognized its application in *Badger* v. *Hoidale,* 88 F. (2nd) 208 (C. C. A. 8th).[12]

II.

Wholly outside of corporate powers after dissolution under state statutes, federal income tax regulations and decisions recognize continued corporate life for income tax purposes, a matter seemingly overlooked by the court. Art. 22 (a)-20, U. S. Treasury Regulations 86 provides:

> "When a corporation is dissolved, its affairs are usually wound up by a receiver or trustee in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes (See sections 274 and 298)."

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[12] The Circuit Court said: "This was probably dictum. But the interpretation and construction of the Constitution of a state is peculiarly within the province of the highest court of the state, and its construction will be followed by the national courts. *Blue Valley Creamery Co.* v. *Consolidated Products Co.* (C. C. A. 8) 81 F. (2nd) 102. Considered dictum of that court should not be ignored when a federal court is attempting to construe or ascertain the meaning of the local law, whether it be the state statute or the State Constitution. *Blue Valley Creamery Co.* v. *Consolidated Products Co.,* supra; Rules applicable to the construction of a statute are equally applicable to the construction of a constitution."

It would be hard to conceive a more expeditious method of liquidating the assets than their transfer in exchange for stock. This regulation is of long standing.[13] It should be applied unless clearly wrong.[14] It is a reasonable regulation and should be given effect.[15] That the corporation acted through trustees or agents is immaterial; it was nevertheless the "party" to the "reorganization."[16]

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[13] Same regulations appears: Art. 547, Reg. 45, Rev. Act of 1918; Art. 548, Reg. 62, Rev. Act of 1921; Art. 548, Reg. 65, Rev. Act of 1924; Art. 548, Reg. 69, Rev. Act of 1926; Art. 71, Reg. 74, Rev. Act of 1928; Art. 71, Reg. 77, Rev. Act of 1932; Art. 22 (a) 21, Reg. 94, Rev. Act of 1936; Art. 19. 22 (a)-21, Reg. 103, Int. Rev. Code.

[14] *Northwest Util. Sec. Corp.* v. *Helvering,* 67 F. (2d) 619.

[15] *Universal Battery Co.* v. *U. S.,* 281 U. S. 480, 40 S. Ct. 422, 74 L. Ed. 1051; *Taylor Oil and Gas Co.* v. *Comm.,* 47 F. (2d) 109.

[16] *Helvering* v. *Cement Investors, Inc.,* Adv. Ops., 86 L. Ed. 1142, June 1, 1942—"Thus it is fair to say that the property transferred was property in which the creditors had an equitable interest and that the transfer was made with their authority and on their behalf * * * And we see no reason to conclude that a beneficial owner of, or equitable claimant to, property is precluded from consummating an exchange which qualifies under section 112 (b) (5) merely because the actual conveyance is made by his trustee or title holder;" *Kleeden* v. *Commissioner,* 38 B. T. A. 821; *Howard Hotel Corporation* v. *Commissioner,* 39 B. T. A. 1147, in which the president of transferror purchased at foreclosure sale as a dry trustee, in which there are many similarities to this case.

Income taxwise, the Board of Tax Appeals and the federal courts have applied the quoted regulation as extending broad powers incident to winding-up.[17]

III.

The decision of the lower court that statutory exceptions must be more specific than the Nebraska statutes (and consequently those of every other state with like provisions), to enable a dissolved corporation to be a party to an income tax reorganization, (R. 234), decides an important question of Federal law which has not been and should be settled by the Supreme Court.

Dissolution ends corporate life unless there is statutory authority for prolongation.[18] However in nearly all states there now exist statutes allowing complete and orderly winding up of a dissolved corporation's affairs.[19] Under such legislation the dissolved corporation is "still in being."[20] And under a like statute is said to retain a qualified existence with capacity to commit an act of

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[17] *McPherson* v. *Comm. Int. Rev.,* 54 F. (2nd) 751, 753 (C. C. A. 9th). (Cal). Referring to a local statute similar to Nebraska's the court said: "The power given the trustees of a dissolved corporation to adjust and settle its affairs under the California statute are broad. * * * Such powers, in so far as the payment of debts and adjustment of disputed matters affecting the assets are concerned, are fully as comprehensive as the directors of a corporation would ordinarily exercise during the active life of the corporation." See *Helvering* v. *South Penn Oil Co.,* 68 F. (2nd) 420, (C. A. A. D. C.).

[18] *Chicago T. & T. Co.* v. *4136 Wilcox Bldg. Corp.,* 302 U. S. 120, 125, 58 S. Ct. 25, 81 L. Ed. 147.

[19] 13 Am. Jur. 1357.

[20] *Oklahoma Natural Gas Co.* v. *Oklahoma,* 273 U. S. 257, 260, 47 S. Ct. 391, 71 L. Ed. 634.

bankruptcy.[21] Within the restrictions of the prolonging statute, "all corporate powers essential to these ends remain unimpaired."[22] "By the express terms of the statute such a corporation continues to possess the power to deal with the property in its possession, for the purpose of winding up the corporate business. Hence, any act * * * consistent with the winding up of the business is an act within the delimited powers * * *."[23] And if "while acting within the scope of its delimited powers, it commits an act of bankruptcy, it would appear to be as amenable to bankruptcy proceedings as any other corporation acting within its full corporate powers."[24]

In federal courts, the question of the status of a dissolved corporation has arisen frequently in connection with bankruptcy jurisdiction.[25] In *Chicago T. & T. Co.* v. *4136 Wilcox Bldg. Corp.*, supra, this court did not deny bankruptcy relief on the ground a dissolved corporation was without power to invoke the Act, but because the period of prolonged life had elapsed.

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[21] *In Re Booth's Drug Store,* 19 F. Supp., 95.

[22] *Hawkins* v. *Glenn,* 131 U. S. 319, 9 S. Ct. 739, 743, 33 L. Ed. 184.

[23] 44 West Virginia Law Quarterly 219, 222.

[24] Ibid.

[25] Ibid. Citing *In re Storck Lumber Co.,* 114 Fed. 360 (D. C. Md. 1902); *White Mountain Paper Co.* v. *Morse & Co.,* 127 Fed. 643 (C. C. A. 1st, 1904); In re Munger Vehicle Tire Co., 159 Fed. 901 (C .C. A. 2nd, 1908); In re Adams & Hoyt Co., 164 Fed. 489 (D. C. Ga. 1908); In re Double Star Brick Co., 210 Fed. 980 (D. C. Cal. 1913); *Hammond* v. *Lyon Realty Co.,* 59 F. (2nd) 592 C. C. A. 4th, 1932); In re 211 East Delaware Place Bldg. Corp., 7 F. Supp. 892 (D. C. Ill. 1934).

Nebraska dissolution statutes came into being with statehood,[26] antedating the National Bankruptcy Act of 1898. Comparable Acts of many states are of earlier origin. If, as the lower court reasons, dissolved corporations are denied benefits of corporate reorganization under income tax laws, because earlier state statutes lack specific authorization, the same lack denies them benefits of other modern remedial legislation, possibly including the National Bankruptcy Act. Thus the decision injects confusion into an important question touching federal laws and ought to be settled by this court.

CONCLUSION

It is respectfully submitted that a writ of certiorari should be granted.

THOMAS S. ALLEN,
Attorney for Petitioner.

December 7, 1942.

HAROLD J. REQUARTTE,
JAMES L. BROWN,
Of Counsel for Petitioner.

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[26] See Estabrook's R. S., Nebraska, 1866.

APPENDIX

Sec. 112 (a), (b) (4), Revenue Act of 1934, 48 Stat. 704:

"(a) General Rule. Upon the • • • exchange of property the entire amount of the gain or loss • • • shall be recognized, except as hereinafter provided in this section.

"(b) Exchanges solely in kind • • •

"(4) Same-Gain of corporation. No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization."

Sec. 112 (g) (1) (C) and (2), Revenue Act of 1934, 48 Stat. 705:

"(g) Definition of Reorganization. As used in this section and section 113:

"(1) The term 'reorganization' means • • • (C) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred,"

"(2) The term 'a party to a reorganization' includes a corporation resulting from a reorganization and includes both corporations in the case of a reorganization resulting from the acquisition by one corporation of stock or properties of another."

Sec. 113 (a) (7), Revenue Act of 1934, 48 Stat. 707:

"(a) Basis (Unadjusted) of Property.—The basis of property shall be the cost of such property; except that—

• • •

"(7) Transfers to corporation where control of property remains in same persons.—If the property was acquired after Dec. 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. * * *"

Sec. 24-107, Compiled Statutes of Nebraska 1929:

"Same, Dissolved, Affairs How Settled. Upon the dissolution, by the expiration of the term of its charter, or otherwise, of any corporation now existing, or hereafter created, and unless other persons be appointed by the legislature, or by some court of competent authority, the directors of managers of the affairs of such corporations, acting last before the time of its dissolution, by whatever name they may be known in law, and the survivors of them, shall be the trustees of the creditors and stockholders of the corporation dissolved, and shall have full power to settle the affairs of the same, collect and pay the outstanding debts, and divide among the stockholders the moneys and property that shall remain, in proportion to the stock of each stockholder paid up, after the payment of debts and necessary expenses; and the persons so constituted trustees shall have authority to sue for and recover the debts and property of the dissolved corporation, by the name of the trustees of such corporation, describing it by its corporate name, and shall be jointly and severally responsible to the creditors and stockholders of such corporation, to the extent of its property and effects that shall come into their hands; and no suit against any such corporation shall abate in consequence of such dis-

solution, and said trustees may be made parties by scire facias; and all liens of judgments and decrees of any courts of equity, existing at the time of such dissolution either in favor of or against such corporation, shall continue in force in the same manner as if such dissolution had not taken place: *Provided*, in case of the death, resignation, inability or refusal to act, of the directors or managers aforesaid, or the survivors thereof, the district court of the proper county may, on the application of any persons interested, appoint trustees to fill the vacancy, with full power to perform the duties aforesaid. (R. S. 1913, 555; C. S. 1922, 447.)"

Sec. 24-108, Compiled Statutes of Nebraska 1929:

"Same, Suits Not to Abate by Expiration of Charter. No suit or action, either at law or in equity, pending in any court, in favor or against any banking or other corporation, shall be discontinued or abate by the dissolution of such corporation, whether such dissolution occur by the expiration of its charter or otherwise; but all such suits or actions may in all courts of justice, be prosecuted by the creditors, assigns, receivers or trustees having the legal charge of the assets of such dissolved corporation, to final judgment or decree, in the corporate name of such dissolved corporation."

Sec. 24-110, Compiled Statutes of Nebraska 1929:

"Same, When Dissolved, Title to Real Estate Passes to Trustee. The title of all real estate belonging to any such corporation shall, at the time of the dissolution of the same, pass to the trustees of such corporation, who shall have full power and authority to sell and dispose of any such real estate, in such manner and upon such terms as may be thought best for the interest of the creditors and stockholders, and upon any such sale to make a good and sufficient title therefor."

Sec. 24-112, Compiled Statutes of Nebraska 1929:

"Same, Suits Prosecuted After Dissolution. Any corporation created by this chapter may, at any time after its dissolution, whether such dissolution occur by the expiration of its charter or otherwise, prosecute any suit at law or in equity, in and by the corporate name of such dissolved corporation, for the use of the party entitled to receive the proceeds of any such suit, upon any and all causes of action accrued, or which, but for such dissolution, would have accrued in favor of such corporation, in the same manner and with the like effect as if such corporation were not dissolved."

Sec. 24-220, Compiled Statutes of Nebraska 1929:

"Same, Expiration by Limitation or Voluntary Act, Continuation for Closing Business Only. Corporations whose charters expire by their own limitation, or by the voluntary act of the stockholders, may continue to act for the purpose of closing their business, but for no other purpose."

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 586

THE CUSHMAN MOTOR WORKS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 23–42) is reported at 44 B. T. A. 1288. The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 230–237) is reported at 130 F. 2d 977.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 19, 1942 (R. 238). Petition for rehearing was denied November 6, 1942 (R. 255). The petition for a writ of certiorari

was filed December 12, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a transaction in which property is transferred by the trustees of a dissolved Nebraska corporation to another corporation may constitute a "reorganization" within the definition of Section 112 (g) (1) of the Revenue Act of 1934.

2. If so, whether in the circumstances of this case the taxpayer had acquired properties from such trustees in connection with a reorganization within the meaning of Sections 112 (g) (1) and 113 (a) (7) of the Act with the result that the basis of the assests in the hands of the trustees will carry over.

STATUTE AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*.

STATEMENT

Cushman Motor Works was organized in 1913 (R. 25). We shall hereinafter refer to it as "Motor Works" to distinguish it from The Cushman Motor Works, a corporation which was formed later and which is the taxpayer in the instant case.

Motor Works owned and operated a manufacturing plant at Lincoln, Nebraska, where it produced internal combustion engines, power lawn mowers and other machinery. Following a series of prosperous years it began to lose money in 1921. As of October 31, 1932, it had an accumulated deficit of $352,995.10 (though its capital stock account still showed a value of $486,204.90). (R. 25–26, 56.)

A partnership consisting of Charles and John Ammon and known as Easy Manufacturing Company operated a neighboring plant. Charles Ammon, acting for the partnership, began buying Motor Works stock in 1930, and by the end of 1932 had acquired a controlling interest. (R. 26.)

Ammon thought that Motor Works could be operated at a profit under the proper conditions. Soon after his original purchases of its stock he discussed with its manager a merger between it and Easy Manufacturing Company. In 1932 he enlarged the proposal to include McGrew Machine Company located nearby and producing sheet metal products. (R. 26.) At this time Motor Works had two classes of stock outstanding, namely 2,938 shares of preferred and 5,454 of common, each share with a par value of $100 (R. 56).

On December 7, 1932, Ammon mailed a letter to the stockholders of Motor Works proposing a merger of Motor Works, the McGrew Machine

Company, and the Easy Manufacturing Company into one corporation. His plan was to issue stock of a new corporation for the assets of the three plants and to sell additional stock at $15 per share to acquire needed cash. His proposal to the stockholders of Motor Works was that Motor Works preferred stock might be exchanged for stock of the new corporation share for share, or might be turned in for $10 cash per share. A third proposal was to allow Motor Works preferred stockholders to receive two shares of stock of the new corporation for one share of Motor Works preferred and $10 in cash. No suggestion was made whereby the holders of the common stock of Motor Works should receive any interest in the new corporation. (R. 26–27.)

At the annual meeting of the stockholders of Motor Works on January 9, 1933, the minority stockholders raised objection to the plan proposed by Ammon, contending that the assets of the company could be sold at a price or prices that would result in a more substantial realization for the stockholders, and a resolution was adopted instructing Fred D. Stone to negotiate with persons desirous of purchasing "the complete assets and business of the company" and directing him to report the results of such negotiations to the board of directors prior to February 11, 1933. Ammon was named chairman of a committee to make further investigation concerning the possibility of "bring-

ing about a consolidation or merger * * * with some other corporation or corporations." He was directed to report at the adjourned meeting of the stockholders to be held on February 13 following. The opposition to this plan proposed by Ammon centered largely in the officers and directors of the corporation and Ammon caused the election of a new board of directors, all of the directors so elected, except one, being from among his associates. (R. 27.)

At the adjourned meeting of the stockholders on February 13, 1933, it was reported that Stone had been unable to obtain any definite proposition for the purchase of "the complete assets and business of the company" (R. 27).

Meanwhile there was pending against Motor Works an action brought by Ammon for the redemption of 88 shares of preferred stock standing in his name. The articles of incorporation provided that a sinking fund for the retirement of the preferred stock should be created out of the net earnings of the corporation that remained after deducting any accrued dividends. Up to 3 percent of the preferred stock might be retired each year on demand of the holders to the extent that the sinking fund so accumulated would permit. In earlier years Motor Works had accrued such a sinking fund in the amount of $17,010, and under date of August 1, 1931, Ammon had made written demand on Motor Works to redeem pre-

ferred stock owned by him in accordance with the redemption provisions thereof. Motor Works had refused the request on the ground that it was not legally so obligated and had claimed further that it was not financially able to do so. On September 7, 1932, Ammon had renewed his demand, asking that Motor Works redeem 88 shares, which, according to his information, was 3 percent of the preferred stock of Motor Works outstanding. Motor Works did not comply with his request and he instituted suit. (R. 28.)

On the day Ammon obtained his judgment, a notice of a special meeting was mailed to the shareholders, calling attention to debts and judgments aggregating $67,000, and stating that immediate action was required. The meeting was called for the purpose of reorganizing and raising at least $65,000 among the stockholders, or dissolving and liquidating the corporation. (R. 28–29.)

The meeting was held March 6, 1933. A resolution was passed referring to accumulated losses, and lack of funds for working capital and to meet current liabilities. The resolution provided that the corporation should be dissolved, and a report of the dissolution filed with the Secretary of State. The directors were instructed to sell the corporate assets, wind up the corporate affairs, and make distribution to the stockholders. Subsequently, the directors met and resolved to carry

out the liquidation by offering the entire plant, assets and business of Motor Works at public auction. Several auction dates were successively set, but the sale was postponed each time for lack of bidders. During this interval Ammon himself was negotiating with a certain Dempster Mill Manufacturing Company to interest it in purchasing some of the assets. Finally, at the end of July, 1933, efforts to auction the assets of Motor Works were abandoned. (R. 29–31.)

At some date not disclosed Ammon personally purchased from the First National Bank, the principal creditor of Motor Works, notes of that company approximating $30,000, paying the face amount plus accrued interest. He also purchased from other creditors accounts payable of approximately $12,000 to $14,000, paying 75 cents on the dollar. He agreed with the creditors from whom the accounts payable were purchased that if the assets and business of Motor Works should be liquidated they should receive an additional 25 cents on each dollar of such accounts, but if the business should continue as a going concern and should remain a customer of such creditors, nothing further was to be paid to them. (R. 31–32.)

Ammon's judgment on his preferred stock claim was set aside May 16, 1933, at the instance of minority shareholders, but he obtained a new judgment on August 1, 1933, which was subsequently affirmed by the Supreme Court of Nebraska in 1935. On

April 19, 1934, execution issued on this judgment, and a portion of the personal property of Motor Works (machinery, furniture, and inventory) was sold by the sheriff in satisfaction on May 16, 1934, for a total price of $16,248.65. A negligible part was sold to outside parties for cash, but the bulk was sold to Ammon and bidders acting for him. Ammon paid about $600 in cash, part of which was used to cover the expenses of the sale. The balance was applied on the judgment, and the balance of the purchase price was paid by cancelling the judgment. Prior to the sale Ammon had told several stockholders and directors of Motor Works that the assets purchased by him would be available for any reorganization of the business that might be worked out. (R. 28, 31–32.) Apparently, Ammon transferred these assets to The Cushman Corporation, newly formed by him to hold them (R. 6–7, 33–34).

Shortly after the execution sale Ammon circulated a new reorganization proposal among the Motor Works shareholders. A new company was to acquire the assets of Motor Works and Cushman Corporation. It would exchange one share of its own stock for each share of Motor Works preferred, and one share of its own stock for each 20 shares of Motor Works common. On June 6, 1934, a notice was mailed to the stockholders of Motor Works concerning a meeting to be held June 15 to consider a plan for the organization of a cor-

poration to continue the business of Motor Works. At the meeting the secretary announced the sale of all of the personal property of Motor Works to satisfy Ammon's judgment and Ammon stated that he had acquired the property for reorganization purposes and not for his personal benefit. The new reorganization proposal was authorized by a vote of 5,817 to 151. The new plan did not involve either Easy Manufacturing Company or McGrew Machine Company. (R. 32–33.)

Taxpayer corporation was formed August 21, 1934. On August 22 a contract was executed designating the taxpayer as party of the first part, The Cushman Corporation as party of the second part, and "Cushman Motor Works, a dissolved corporation" as party of the third part. The contract was signed in behalf of the Motor Works by the directors as trustees. (R. 33–34.) The agreement provided for the transfer of all of Motor Works' assets to the taxpayer, and the taxpayer's assumption of Motor Works' debts aggregating $8,846.46. For each preferred share of Motor Works, taxpayer agreed to give one $10 par share of its own, plus rights to buy two more shares at $10 each before October 1, 1934. Taxpayer also agreed to repurchase its own stock on demand for $7.50 in 1934; $8 in 1935, and increasing amounts ending with $10 in 1937. Stockholders preferring cash were offered $7.50 for each share of preferred stock. In addition, taxpayer gave one of its shares

for each 20 shares of Motor Works common offered (though this was not mentioned in the agreement). Over 80 per cent of the Motor Works' shareholders participated in the plan. (R. 33–37.)

The agreement further provided that The Cushman Corporation would turn over its assets (which were recited to have been acquired for the benefit of the preferred shareholders of Motor Works and for reorganization purposes) for 100 shares of taxpayer's stock. Eighty-eight percent represented the 88 shares of preferred forming the basis for Ammon's judgment, and the balance represented reimbursement for the expenses incurred by Ammon in connection with the suit and sale. The shares were issued directly to Ammon or his order. In addition, Ammon applied the indebtedness held by him against Motor Works toward the purchases of additional stock of the taxpayer at the actual cost to him of the accounts so used. (R. 4, 36–37.)

Neither Ammon nor Cushman Corporation had ever taken possession of the assets purchased by him. Motor Works never ceased to operate. Its business continued without interruption following its dissolution and until the formation of taxpayer to take it over. (R. 36.)

This case is concerned with the basis to be assigned to the assets purchased by Ammon at the execution sale and turned over to taxpayer through The Cushman Corporation. The Commissioner assigned a basis to them of $16,146.76, their stipu-

lated value on May 16, 1934, when they were purchased by Ammon. (R. 37.) The taxpayer argued for a continuation of the adjusted basis which Motor Works had in these assets. The Board of Tax Appeals sustained the Commissioner and the Circuit Court of Appeals affirmed (R. 237).

ARGUMENT

The decision below appears to be based on two grounds. The first is that under Nebraska law a dissolved corporation is not authorized to become a party to a reorganization under Section 112 (g) of the Revenue Act. The second is that the dissolution of the Motor Works and Ammon's intervening ownership of the assets were not intermediate procedural steps in a single plan but were transactions separate from the subsequent transfer of these and the remaining assets of Motor Works to the taxpayer. In this latter view of the case, Ammon's application of his judgment in satisfaction of his purchases at the execution sale was a separate taxable transaction, and the basis of the assets in his hands was their market value;[1] accordingly, while we may assume that the taxpayer would be entitled to the basis of the assets in Ammon's

[1] *Helvering* v. *New President Corp.*, 122 F. 2d 92 (C. C. A. 8th); *Commissioner* v. *West Production Co.*, 121 F. 2d 9 (C. C. A. 5th), certiorari denied, 314 U. S. 682; *Hadley Falls Trust Co.* v. *United States*, 110 F. 2d 887 (C. C. A. 1st).

hands (as the Commissioner ruled),[2] it would not be entitled to a carry-over of Motor Works' basis.

The taxpayer has interpreted the decision below as turning solely on the corporate incapacity of Motor Works (Br. 4–5), and contends that the ruling on this point represents an erroneous interpretation of the Nebraska authorities. The possibility is ignored that, even if this interpretation of the opinion should be correct, the decision should be sustained on other grounds.

1. The point upon which the taxpayer seeks review was not advanced by the Commissioner either before the Board of Tax Appeals or before the court below. As we analyze the problem, the question of corporate capacity under state law is immaterial. The issue, for federal tax purposes, is whether the enterprise, as conducted by the trustees, continued to be a "corporation" within the meaning of the federal tax statute. It seems probable that it did. Section 801 (a) (2), Revenue Act of 1934; *cf.* Articles 22 (a)–21 and 801–2, Treasury Regulations 86. Accordingly, any transaction, to which the trustees in fact became parties, would have been a reorganization if it had other-

[2] This would depend upon the application of Sections 112 (b) (5), 112 (g), 113 (a) (7), and 113 (a) (8) of the Act to the subsequent transactions, which may be questioned. If not applicable, the taxpayer's basis would be lower than that assigned. The point, however, is not essential to the discussion here.

wise complied with the requirements of Section 112 (g) (1).

The point, however, is a novel one, which does not appear previously to have been before the federal courts. And since the decision is properly sustainable on other grounds, we think that there is no occasion for further review of the case.

2. The Board of Tax Appeals, in its opinion, emphasized the separation of the ultimate transfer of the Motor Works assets from all the steps which preceded it (R. 40–41). The court below, as we have indicated, agreed with this analysis of the transaction. That conclusion is correct.

If a plan of reorganization has been proposed and agreed to by the requisite percentage of securities holders of an old corporation, a purchase of the assets at a distress sale by an agent of the participants (for a consideration consisting principally of a cancellation of claims), and a transfer of the assets from the agent to the new corporation, ordinarily may be disregarded as incidental steps in effecting the reorganization transfer from the old to the new corporation. Cf. *Helvering* v. *Limestone Co.*, 315 U. S. 179. But the ownership acquired by Ammon at the execution sale in the instant case was of an independent character. He was not a mere conduit through which the property passed on its way from Motor Works to taxpayer. His ownership and that of The Cushman Corporation would have been unnecessary as pro-

cedural steps in carrying out an agreed plan of reorganization.

When Ammon bought the Motor Works personal property at the execution sale in May 1934, no reorganization plan was pending. The sequence of events was as follows: In 1932 Ammon began to push a plan for merger of Motor Works, Easy Manufacturing Company, and McGrew Machine Company. Opposition developed, and was strongly expressed at a stockholders' meeting of January 9, 1933. On February 25, 1933, Ammon obtained his first judgment, and on the same day notice was mailed of a stockholders' meeting to consider either reorganization or liquidation. At the meeting, held March 6, 1933, it was determined to liquidate, not to reorganize, and subsequent efforts in that direction were made. These were abandoned in July 1933, for lack of prospective buyers. In May 1933 Ammon's judgment had been set aside at the instance of other stockholders, but he obtained a new judgment in August. Following a levy of execution, Ammon bought in the property levied on in May 1934 and thereafter he began circulating the plan which was finally adopted and carried out, and which did not involve either the Easy or McGrew Companies. (R. 28–37.)

It is apparent that Ammon obtained his judgment and bought in the personal property for the purpose of forcing recalcitrant stockholders to agree to the reorganization which he had in

mind and himself wanted to effect. Ammon virtually admitted this on the stand, and another witness testified that Ammon had expressed such a purpose to him. (R. 83, 128, 151.) In effect Ammon was saying that if the other stockholders would agree to his plan, he would turn the assets over to the new enterprise; if not, he would keep them and they would find a serious depletion of the assets to which they could look for reimbursement of their invested capital. Whereas the record reveals various expressions by Ammon (pp. 34, 75, 99, 163–165) that he bought in the property for the benefit of the Motor Works stockholders and with the idea of effecting a plan of reorganization, the implied threat was there that he had brought them for himself if the reorganization did not materialize. Certainly he had not obtained the judgment or taken over the properties at the execution sale in the capacity of agent or fiduciary for other stockholders, as had the creditors' committee, for example, in *Helvering* v. *Limestone Co., supra,* and *Palm Springs Corp.* v. *Commissioner,* 315 U. S. 185. In these circumstances, Ammon's ownership was the sort of independent ownership intervening between that of the old corporation and that of the new which frequently has been held to prevent a finding of reorganization under the tax statutes. *Cf. Bondholders' Committee* v. *Commissioner,* 315 U. S.

189; *Templeton's Jewelers* v. *United States,* 126 F. 2d 251 (C. C. A. 6th); *Mascot Stove Co.* v. *Commissioner,* 120 F. 2d 153 (C. C. A. 6th), certiorari denied, 315 U. S. 802; *Klein Co.* v. *Commissioner,* 123 F. 2d 871 (C. C. A. 7th), certiorari denied, 315 U. S. 819.

3. The decision below may also be supported even if Ammon's intervening ownership is disregarded. The transaction plainly was not a "statutory merger or consolidation" under Clause A of Section 112 (g) (1), a "recapitalization" under Clause D, or a mere "change in identity, form or place of organization" under Clause E. The purchase rights issued by the taxpayer, its repurchase agreement, and the cash which it paid prevent the acquisition from being one "solely for * * * voting stock" as required by Clause B. *Helvering* v. *Southwest Corp.,* 315 U. S. 194; see also *Commissioner* v. *Air Reduction Co., Inc.,* 130 F. 2d 145 (C. C. A. 2d). And there was not established the necessary continuation of stockholder "control" required by Clause C if, as we contended below, only the stock received by the old stockholders *qua* stockholders may be counted.

CONCLUSION

Although the opinion below was based largely on a doubtful ground, the result reached was correct. The case turns chiefly upon its own peculiar facts, and involves no conflict among the circuits.

Accordingly, there is no occasion for further review.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWALL KEY,
SAMUEL H. LEVY,
JOSEPH M. JONES,
Special Assistants to the Attorney General.
JANUARY 1943.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

* * * * *

(g) *Definition of Reorganization.*—As used in this section and section 113—

(1) The term "reorganization" means (A) a statutory merger or consolidation, or (B) the acquisition by one corporation in exchange solely for all or a part of its voting stock: of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of another corporation; or of substantially all the properties of another corporation, or (C) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (D) a recapitalization, or (E) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of a reorganization resulting from the acquisition by one corporation of stock or properties of another.

(h) *Definition of Control.*—As used in this section the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of

the total number of shares of all other classes of stock of the corporation.

* * * * *

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(7) *Transfers to corporation where control of property remains in same persons.*—If the property was acquired after December 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. This paragraph shall not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by the issuance of stock or securities of the transferee as the consideration in whole or in part for the transfer.

* * * * *

SEC. 801. DEFINITIONS.

(a) When used in this Act—

* * * * *

(2) The term "corporation" includes associations, joint-stock companies, and insurance companies.

* * * * *

Treasury Regulations 86 (1934 Ed.):

ART. 22 (a)–21. *Gross income of corporation in liquidation.*—When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes. (See sections 274 and 298.) Any sales of property by them are to be treated as if made by the corporation for the purpose of ascertaining the gain or loss. * * *

* * * * *

ART. 112 (g)–1. *Purpose and scope of exception of reorganization exchanges.*— * * * The purpose of the reorganization provisions of the Act is to except from the general rule certain specifically described exchanges incident to such readjustments of corporate structures, made in one of the particular ways specified in the Act, as are required by business exigencies, and which effect only a readjustment of continuing interests in property under modified corporate forms. * * * In order to exclude transactions not intended to be included, the specifications of the reorganization provisions of the law are precise. Both the terms of the specifications and their underlying assumptions and puposes must be satisfied in order to entitle the taxpayer to the benefit of the exception from the general rule * * *.

ART. 112 (g)–2. [As amended by T. D. 4585, XIV–2 Cum. Bull. 54 (1935).] *Definition of terms.*— * * *

* * * * *

The words "statutory merger or consolidation" refer to a merger or a consolidation effected in pursuance of the corporation laws of the United States or a State or Territory or the District of Columbia.

In order to qualify as a "reorganization" under section 112 (g) (1) (B), the acquisition by the acquiring corporation of the required amount of the stock, or of substantially all the properties, of the other corporation must be in exchange *solely* for all or a part of the *voting stock* of the acquiring corporation. If, for example, Corporation X exchanges nonvoting preferred stock or bonds in addition to all or a part of its voting stock in the acquisition of the required amount of stock, or of the properties, of Corporation Y, the transaction is not a "reorganization" exchange, and the gain or loss therefrom will be recognized.

A "recapitalization," and therefore a reorganization, takes place if, for example:

(1) A corporation with $200,000 par value of bonds outstanding, instead of paying them off in cash, discharges them by issuing preferred shares to the bondholders, par for par;

(2) There is surrendered to a corporation for cancellation 25 per cent of its preferred stock in exchange for no par value common stock;

(3) A corporation issues preferred stock, previously authorized but unissued, for outstanding common stock; or

(4) An exchange is made of a corporation's outstanding preferred stock, having certain priorities with reference to the amount and time of payment of dividends and the distribution of the corporate assets upon liquidation, for a new issue of such

corporation's common stock having no such rights.

* * * * *

ART. 801–2. *Association.*—The term "association" is not used in the Act in any narrow or techincal sense. It includes any organization, created for the transaction of designated affairs, or the attainment of some object, which like a corporation, continues notwithstanding that its members or participants change, and the affairs of which, like corporate affairs, are conducted by a single individual, a committee, a board, or some other group, acting in a representative capacity. It is immaterial whether such organization is created by an agreement, a declaration of trust, a statute, or otherwise. It includes a voluntary association, a joint-stock association or company, a "business" trust, a "Massachusetts" trust, a "common law" trust, an "investment" trust (whether of the fixed or the management type), an interinsurance exchange operating through an attorney in fact, a partnership association, and any other type of organization (by whatever name known) which is not, within the meaning of the Act, a trust or an estate, or a partnership. If the conduct of the affairs of a corporation continues after the expiration of its charter, or the termination of its existance, it becomes an association.

U. S. GOVERNMENT PRINTING OFFICE: 1943